1-29-1976

Charles E. Jenkins v. Commonwealth of Kentucky

Appellee's Brief 1975-SC-0752

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APPELLEE'S BRIEF

3823

SUPREME COURT OF KENTUCKY

File No. 75-768

JAMES J. CORBETT — APPELLANT

V.

COMMONWEALTH OF KENTUCKY — APPELLEE

and

APPEALS FROM HENDERSON CIRCUIT COURT
HON. CARL D. MELTON, JUDGE

File No. 75-752

CHARLES E. JENKINS — APPELLANT

V.

COMMONWEALTH OF KENTUCKY — APPELLEE

BRIEF FOR APPELLEE

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This is to certify that a copy of the foregoing Brief for Appellee has been mailed, postage prepaid, to the Hon. Carl D. Melton, Judge, Henderson Circuit Court, Court House, Henderson, Kentucky 42420; Hon. Ulvester Walker, Commonwealth Attorney, 210 3rd Street, Henderson, Kentucky 42420; Hon. Vincent D. Giovanni, Assistant Public Defender, 625 Leawood Dr., Frankfort, Kentucky 40601; and Hon. Timothy T. Riddell, Assistant Public Defender, 625 Leawood Dr., Frankfort, Kentucky 40601, Counsel for Appellants, this 29th day of January, 1976.

Victor Fox
Assistant Attorney General

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STATEMENT OF THE QUESTIONS PRESENTED

I. WHETHER OR NOT THE TRIAL COURT ERRED IN OVERRULING APPELLANTS' MOTIONS FOR THE TRIAL JUDGE TO VACATE THE BENCH?

II. WHETHER OR NOT THE TRIAL COURT ABUSED ITS DISCRETION IN OVERRULING APPELLANTS' MOTIONS FOR SEVERANCE OF THE DIFFERENT COUNTS OF THE INDICTMENT?

III. WHETHER OR NOT APPELLANTS' RIGHTS WERE ABRIDGED BY THE TRIAL COURT'S REFUSAL TO ALLOW CROSS-EXAMINATION IN CERTAIN AREAS?

IV. WHETHER OR NOT THE TRIAL COURT ERRED IN REFUSING APPELLANT JENKINS' MOTION FOR A CONTINUANCE?

V. WHETHER OR NOT THE TRIAL COURT'S FAILURE TO DECLARE A MISTRIAL WAS SUBSTANTIAL ERROR?

VI. WHETHER OR NOT THE COURT WILL CONSIDER ON APPEAL AN ALLEGED ERROR THAT WAS NOT PROPERLY PRESERVED WHERE THE RECORD DOES NOT INDICATE A MANIFEST INJUSTICE?

VII. WHETHER OR NOT THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR A CHANGE OF VENUE?

VIII. WHETHER OR NOT TRIAL COURT ERRED IN OVERRULING APPELLANT CORBETT'S MOTION FOR A SEPARATE TRIAL?

IX. WHETHER OR NOT THE TRIAL COURT ERRED IN NOT GRANTING A CONTINUANCE?

X. WHETHER OR NOT THE EVIDENCE OF STOREHOUSE BREAKING WAS SUFFICIENT TO SUSTAIN THE VERDICT?

XI. WHETHER OR NOT LIFE IMPRISONMENT UNDER THE HABITUAL CRIMINAL ACT IS CRUEL AND UNUSUAL PUNISHMENT PROHIBITED BY THE KENTUCKY AND U.S. CONSTITUTIONS?

XII. WHETHER OR NOT THE RECORD AS A WHOLE INDICATES APPELLANT WAS SUBSTANTIALLY PREJUDICED AND DENIED A FAIR TRIAL?

COUNTERSTATEMENT OF THE CASE

Appellee accepts as essentially correct, appellants' statement of the case. Additional facts which are necessary for the proper determination of this appeal will be set forth in the arguments below.

ARGUMENT

I.

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANTS' MOTIONS FOR THE TRIAL JUDGE TO VACATE THE BENCH.

Both appellants sought, by way of pretrial motions, to have the trial judge remove himself from the case (Trial Record, hereinafter TR, pp. 15, 21, 114). Pursuant to KRS 23.230, each filed an affidavit setting forth facts in support of their motions. The affidavits contained information that the trial judge had, as county attorney and commonwealth's attorney, on several occasions

prosecuted the appellants for various criminal activities (TR pp. 16, 22). The trial court overruled the motions on the grounds the facts stated were insufficient to show prejudice (TR pp. 48-49). Previous actions as a prosecutor or judge in itself is not sufficient to show prejudice. McCarthy v. Commonwealth, Ky., 450 S.W.2d 534 (1970). Cf. Eastridge v. Commonwealth, 195 Ky. 126, 241 S.W. 806 (1922). In Foster v. Commonwealth, Ky., 348 S.W.2d 759 (1961) this Court wrote:

> "This statute [KRS 23.230] has been construed to require a statement of facts which not only show bias, prejudice or personal hostility toward the accused, but that such is of a character calculated seriously to impair the judge's impartiality and sway his judgment." At 760.

Reading the affidavits reveals only that Judge Melton was doing his sworn duty in prosecuting the previous, unrelated criminal activities. Under McCarthy, supra, this was not sufficient to show prejudice and require removal, and there was no error in overruling the motions.

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN OVERRULING APPELLANTS' MOTIONS FOR SEVERANCE OF THE DIFFERENT COUNTS OF THE INDICTMENT.

Appellants each sought severance of the multi-count indictment against them. The motions were overruled on the grounds it would not prejudice them. Whether or not severance is granted is within the discretion of the trial court which must weigh possible prejudice to the defendant. Russell v. Commonwealth, Ky., 482 S.W.2d 584 (1972); Edwards v. Commonwealth, Ky., 500 S.W.2d 396 (1973). Only if the trial court's refusal is a clear

abuse of discretion and prejudice to the defendant is positively shown will there be reversal. Edwards, supra.

The first three counts of the indictment involved theft (two counts of storehouse breaking and one count of dwelling house breaking); the next three counts stemmed from a theft (armed robbery). The acts underlying the various counts were acts of a similar nature, to-wit taking another person's property. Appellants fail to positively show prejudice. Any prejudice which appellants might have been subjected to was certainly removed when the trial court gave directed verdicts on the majority of the counts. Appellant Corbett was given a directed verdict on all substantive counts except a storehouse breaking. Appellant Jenkins received directed verdicts on the dwelling house breaking and one storehouse breaking, leaving only two felony counts for the jury.

There was no abuse of discretion by the trial court, and even if there were, prejudice if any is not positively shown.

III.

APPELLANTS' RIGHTS WERE NOT ABRIDGED BY THE TRIAL COURT'S REFUSAL TO ALLOW CROSS-EXAMINATION IN CERTAIN AREAS.

Jenkins and Corbett next argue that error was committed when they were denied the opportunity to impeach a prosecution witness, James Svara. Both wanted to show that the witness had been court-martialed by the military for "theft." It is not clear what type of court-martial this was or even if it were a court-martial. It is not clear what the charges or specifications were, since the Uniform Code of Military Justice does not contain a punitive article against "theft." Manual for Courts-Martial,

United States, 1969, (Revised Edition) Chapter XXVIII. While the trial court may have been wrong in his belief regarding the procedural safeguards in military justice, the denial to utilize the military record was not error since only certain felonies can be used and it was not shown that this was in fact a felony. Even if it were error, it certainly isn't prejudicial in view of the witness, on direct examination, admitting to participating in robbery and murder (Transcript of Evidence, hereinafter TE, p. 585) and answering that he had been court-martialed (TE p. 405). An additional admission of a felony, if it were, certainly could not have affected his credibility to a greater degree than had already been done.

In addition to the court-martial, appellant Corbett also cites the denial of cross-examination as to previous testimony and psychiatric treatment, both for purposes, apparently, of prior inconsistent statements.

By avowal, it was stated that the witness would have testified that (1) he received a General Discharge under honorable conditions and (2) the witness was not eligible for reenlistment (TE p. 416). The trial court ruled that since the evidence was incompetent and that the official transcript of the previous trial was not available, it could not be admitted. This was not error, for the avowal itself does not show inconsistency. An individual can receive a General Discharge under honorable conditions and not be eligible for reenlistment. (Table 4-6, Army Regulation 601-210, page 4-31). The latter does not affect the honorable conditions of the former.

The question surrounding the psychiatric treatment is without merit. The witness was cross-examined in this area (TE pp. 412-414).

Appellee submits that in view of the extensive and excellent cross-examination conducted by both defense counsel, appellants' Sixth Amendment rights were fully exercised and no error was committed.

IV.

THE TRIAL COURT DID NOT ERR IN REFUSING APPELLANT JENKINS' MOTION FOR A CONTINUANCE.

Appellant Jenkins, pro se, two days prior to trial date, sought a continuance. As grounds for the continuance, appellant cited his recent murder trial and insufficient time to prepare for trial (TR pp. 111-113). Appellant points out correctly that granting a continuance is within the discretion of the trial court and unless there is clear abuse, the appellate court will not disturb the findings.

On November 2, 1974, trial date was set for March 12, 1975. On February 3, 1975, new trial counsel was appointed to represent appellant. Counsel advised the court that he would be in a position to represent the appellant (TR p. 96). At the hearing on the day before trial, counsel joined in the pro se motion stating he had had the opportunity to talk to appellant one time and had tried five cases that month (Transcript of Pretrial Motions, hereinafter TEPTM, p. 7). It appears that counsel had time to familiarize himself with the case and in light of the excellent defense made by counsel he was in fact prepared for the trial. Appellant had been represented by trial

counsel for a period of several weeks and the denial of his motion made two days prior to trial was not an abuse of discretion. Scillion v. Commonwealth, Ky., 508 S.W.2d 307 (1974).

Appellant's other reason given was "pretrial publicity." He called to the court's attention a local newspaper article which made reference to appellant's previous trial for murder (TEPTM pp. 8-9). That statement, as it appeared, cannot be considered to have reached the proportions of excessive pretrial publicity. Nothing in the article was sufficient to establish prejudice. There is no evidence of any attempt to keep the publicity alive and before the public and no evidence of inflaming the populace. Schweinefuss v. Commonwealth, Ky., 395 S.W.2d 370 (1965). It is apparent the trial court did not abuse its discretion by denying the continuance.

V.

THE TRIAL COURT'S FAILURE TO DECLARE A MISTRIAL WAS NOT SUBSTANTIAL ERROR.

Appellant contends that because evidence of a void conviction (at least for purposes of KRS 431.190) was introduced together with two other convictions, he was entitled to a mistrial.

Appellant had been indicted under the Habitual Criminal Act of having been convicted of three prior felonies. Evidence of all three felonies was introduced as evidence in chief. The fact that one of the convictions was void only acted to change the penalty. The difference of one conviction could not have prejudiced the appellant. As Justice Palmore said in his dissent in Hardin v. Commonwealth, Ky., 428 S.W.2d 224 at 226 (1968):

"Even as a prosecuting attorney I felt the admission of prior convictions as evidence in chief in the trial of an indictment under the Habitual Criminal Act was so killingly prejudicial as to deprive the defendant of a fair trial on the principal charge. Regrettably, however, it was standard procedure and the only way of invoking the statute."

Admitting any conviction as evidence in chief was prejudicial to the appellant, but under the fact situation at hand the exposure of the jury to one void conviction does not amount to substantial error requiring reversal since there were still two convictions for the jury's consideration. Any prejudice which may have occurred was taken care of by the court's instruction number 4 (TR p. 153). Appellee submits that considering the whole record there was no substantial prejudice to appellant's rights which would have required a mistrial and a reversal for failure to grant a mistrial. RCr 9.26.

VI.

THE COURT WILL NOT CONSIDER ON APPEAL AN ALLEGED ERROR THAT WAS NOT PROPERLY PRESERVED WHERE THE RECORD DOES NOT INDICATE A MANIFEST INJUSTICE.

Appellant Jenkins for his final assignment of error claims he was convicted on two counts of being an habitual criminal, though only charged with one count. Appellant made no objection to the instruction and as such cannot now raise the matter on appeal. RCr 9.54, RCr 9.22, Ferguson v. Commonwealth, Ky., 512 S.W.2d 501 (1974). This Court has as in Stone v. Commonwealth, Ky., 456 S.W.2d 43 (1970) considered such matters where the record indicates a manifest injustice. The record here does not indicate any injustice, let alone a manifest injustice. Appellant was found

guilty on one count of being an habitual criminal. That conviction was used to enhance the penalty on the two felony convictions. This was not error, so therefore it could not be manifest injustice. Nor does the trial court's judgment for the sentences to run consecutively in any way compound the alleged error.

VII.

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT'S MOTION FOR A CHANGE OF VENUE.

Appellant Corbett alleges that he was denied a fair trial by the trial court's failure to grant him a change of venue. Appellant filed a motion for a change of venue on December 12, 1974 (TR p. 27). A hearing on the motion was set for December 23, 1974 (TR p. 51). On December 23, 1974, affidavits in support of the motion were filed (TR pp. 87-88). The trial court overruled appellant's motion on December 23, 1974 and set forth therein the reasons for denying the motion (TR p. 89). On March 10, 1975, appellant again filed a motion for a change of venue (TR p. 124). This motion was subscribed and sworn to by the appellant on March 10, 1975. The same affidavits or copies thereof which were used in the first motion were refiled in support of the second motion (TR pp. 87, 127, 88, 126). These affidavits were dated November 22, 1974 and November 29, 1974 respectively.

At the hearing on pretrial motions, the Commonwealth moved to summarily overrule the motion because first, the affidavits had not been served as required by KRS 452.220(2) and secondly, the affidavits predated the motion of the appellant by some three and one-half months (TEPTM pp. 47-52). The trial

court listened to the commonwealth attorney's and defense attorney's argument and then sustained the Commonwealth's motion to overrule (TEPTM p. 52).

Whether or not a change of venue is granted is within the discretion of the trial court and a ruling will not be disturbed unless there is abuse of that discretion. When there is a failure to file the statutorily required affidavits in support of motion, it is fatal to the claim of error based on denial of motion for change of venue. Caine v. Commonwealth, Ky., 491 S.W.2d 824 (1973), cert. denied 441 U.S. 876, 94 S.Ct. 80, 38 L.Ed.2d 121.

Appellant was aware of the statutory procedure from his first attempt and to ignore it in his second attempt two months later cannot serve as evidence of abuse of the trial court's discretion. One further point, the supporting affidavits refer to the situation as it supposedly existed in the middle of November 1974. Nothing in them purports to state the situation in the middle of March 1975.

VIII.

THE TRIAL COURT DID NOT ERR IN OVERRULING APPELLANT CORBETT'S MOTION FOR A SEPARATE TRIAL.

Corbett argues that it was error for the trial court to overrule his motion for a separate trial. He admits that severance is a matter of discretion and that there will be no reversal except for an abuse of discretion. He argues that even if there was no abuse, the denial should be considered in his cumulative error argument infra.

Corbett again made two motions for a separate trial from his co-defendant. The first was made on December 12, 1974 (TR p. 32), and after a hearing, was denied on December 16, 1974 (TR p. 53). On March 10, 1975 appellant again requested a separate trial (TR p. 122). After a hearing (TEPTM pp. 41-46) the court denied the motion (TR p. 137). Appellant failed to demonstrate that he would be prejudiced by the joint trial, RCr 9.16, and since the evidence heard by the court does not show the prejudice, there was no abuse of discretion. To justify a severance, the evidence must indicate antagonistic defenses or that the evidence against one defendant will directly incriminate the other defendant. Tinsley v. Commonwealth, Ky., 495 S.W.2d 776 (1973), cert. denied 414 U.S. 1077, 94 S.Ct. 595, 38 L.Ed.2d 484. Cf. Franklin v. Commonwealth, Ky., 490 S.W.2d 148 (1972), cert. denied 414 U.S. 858, 94 S.Ct. 66, 38 L.Ed.2d 108.

IX.

THE TRIAL COURT DID NOT ERR IN NOT GRANTING A CONTINUANCE.

Appellant Corbett had sought by way of a subpoena duces tecum all military records of the prosecuting witness James Svara. At the beginning of Svara's testimony, all attorneys were allowed to examine the requested records. Corbett alleged that certain records were not included with the answered subpoena. He sought a continuance on this ground and it was denied by the trial court. Corbett again accepts the fact that such continuances are within the discretion of the court, but claims there was an abuse of discretion.

The trial court stated that it appeared to the court the subpoena was fully complied with as the reason for overruling the requested continuance. The records alleged to be missing dealt with Svara's medical history. Corbett specifically claims that he was unable to impeach Svara regarding psychiatric treatment, yet the Transcript of Evidence indicates that there were documents in the record pertaining to this matter (TE p. 412).

In light of the record it cannot be said that Corbett has shown the trial court abused its discretion, and this Court should not disturb that ruling. Neither is there a showing of manifest injustice. Adams v. Commonwealth, Ky., 424 S.W.2d 849 (1968).

X.

THE EVIDENCE OF STOREHOUSE BREAKING WAS SUFFICIENT TO SUSTAIN THE VERDICT.

Corbett next contends that the evidence was insufficient to support the verdict of guilty on the charge of storehouse breaking. The evidence which was available for the jury was the testimony of James Svara (TE p. 341), the recovery of the stolen explosive from a building belonging to Corbett's father and to which Corbett had access (TE p. 458), and the testimony showing that the explosives recovered came from the Retiki mine (TE pp. 506-508). None of this evidence was contradicted and it was therefore a question for the trier of fact.

The Court in considering the sufficiency of the evidence is required to view the evidence as well as inferences properly deducible therefrom, in light most favorable to the Commonwealth. U.S. v. Salter, 346 F.2d 509, cert. denied 383 U.S. 943, 86 S.Ct.

1196, 16 L.Ed.2d 206 (1965); Wood v. Commonwealth, 229 Ky. 459, 17 S.W.2d 443 (1929). Appellee submits that, considering the evidence and proper inferences, it was sufficient for the jury to reach its verdict and the verdict should not be overruled.

XI.

LIFE IMPRISONMENT UNDER THE HABITUAL CRIMINAL ACT IS NOT CRUEL AND UNUSUAL PUNISHMENT PROHIBITED BY THE KENTUCKY AND U.S. CONSTITUTIONS.

Corbett also contends that the imposition of life imprisonment under the Habitual Criminal Act (KRS 431.190) is cruel and unusual punishment prohibited both by the Kentucky and U.S. Constitutions.

As this Court has stated previously, the best argument for the validity of the habitual criminal statute lies in the fact that it serves a legitimate penal purpose. Wingo v. Ringo, Ky., 408 S.W.2d 469 (1966). Life imprisonment serves a legitimate need. Those persons who receive such penalties have a chance for parole and subsequent rehabilitation. Cox v. Commonwealth, Ky., 514 S.W.2d 49 (1974); Rolack v. Commonwealth, Ky., 514 S.W.2d 47 (1974). Corbett's claim is without merit and the judgment should not be disturbed on this point.

XII.

THE RECORD AS A WHOLE INDICATES APPELLANT WAS NOT SUBSTANTIALLY PREJUDICED AND WAS NOT DENIED A FAIR TRIAL.

Appellant Corbett asks the Court to consider the entire record for the cumulative effect of the alleged errors. This

Court will reverse when, upon consideration of the whole case, it is satisfied that the substantial rights of the defendant have been prejudiced. RCr 9.26. The Court should use its extraordinary powers only where the record shows from the facts developed that there has been a miscarriage of justice. Stone v. Commonwealth, Ky., 456 S.W.2d 43 (1970).

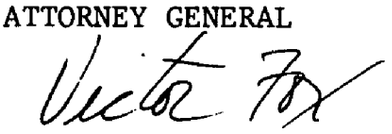
The majority of appellant's "errors" are without merit. Reading the record shows no cumulative or individual deprivation of appellant's right to a fair trial. He is not entitled to an error-free trial, but a fair trial. This he received. The trial court's efforts to protect the individual rights are seen throughout the record. The directed verdicts, the numerous admonitions, both requested and on the court's own initiative, and the numerous in-camera hearings indicate the fairness of the trial. Appellee submits that after considering the whole case, the substantial rights of the appellant were not prejudiced and there has not been a miscarriage of justice.

CONCLUSION

For the foregoing reasons, appellee requests the judgments of the Henderson Circuit Court be affirmed.

Respectfully submitted,

ROBERT F. STEPHENS
ATTORNEY GENERAL



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